# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of	)	
Applications of Sprint Nextel Corporation, Transferor	)	IB Docket No. 12-343
SoftBank Corp., and Starburst II, Inc., Transferees	)	
Joint Applications for Consent to Transfer of	)	
Control of Licenses, Leases, and	)	
Authorizations; and Petition for Declaratory	)	
Ruling under Section 310(b)(4) of the	)	
Communications Act of 1934, as amended	)	

### REQUEST TO HOLD PROCEEDING IN ABEYANCE

### I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. ("DISH") requests that the above-captioned proceeding, for which petitions to deny are currently due January 28, 2013, be held in abeyance, and that the "shot clock" in this proceeding be paused, until the resolution of significant unresolved contingencies concerning Sprint Nextel Corporation's ("Sprint") offer to acquire all of Clearwire Corporation ("Clearwire"). In this proceeding, Sprint seeks not only the authority to be acquired by SoftBank Corporation ("SoftBank"); it also requests authority to acquire the stock of Clearwire that it does not already own, as well as *de facto* control over Clearwire. But Sprint's acquisition of control over Clearwire is subject to, among other things, a vote of the non-Sprint shareholders in the face

Docket No. 12-343, DA-12-1924 (rel. Nov. 30, 2012) (the "Applications").

1

<sup>&</sup>lt;sup>1</sup> See SoftBank and Sprint File Amendment to Their Previously Filed Applications to Reflect Sprint's Proposed Acquisition of *De Facto* Control of Clearwire, Public Notice, DA 12-2090 (rel. Dec. 27, 2012); SoftBank and Sprint Seek FCC Consent to the Transfer of Control of Various Licenses, Leases, and Authorizations from Sprint to SoftBank, and to the Grant of a Declaratory Ruling Under Section 310(b)(4) of the Communications Act, Public Notice, IB

of a higher value offer made by DISH and Clearwire's response to DISH's offer. These contingencies make SoftBank's and Sprint's applications unripe for consideration.

Indeed, with competing offers for Clearwire in place, premature Commission evaluation of Sprint's initial offer could undermine the Commission's policy objective of neutrality in takeover contests by giving SoftBank and Sprint (together, the "Applicants") a very real advantage in the corporate valuation process.

Abeyance is warranted for one more reason: Sprint's purchase of the Eagle River shares, predicate and prologue to its acquisition of the rest of the Clearwire shares, is subject to two petitions for reconsideration. The impropriety of this transaction has facilitated Sprint's offer, which minority shareholders have characterized as coercive, to buy all of Clearwire. Prudence and orderliness counsel that the Commission not take up the larger transaction until it evaluates the challenges to the propriety of the precursor Eagle River transaction. This is especially so in light of the highly unusual position taken by Clearwire in its opposition to Crest Financial's petition—that a transfer of control is not substantial unless *de facto* control is transferred alongside *de jure* control.

### II. THE APPLICATIONS ARE NOT RIPE FOR REVIEW

On December 20, 2012, the Applicants amended their Applications to reflect Sprint's proposed acquisition of the Clearwire shares that Sprint does not own for \$2.97 per share.<sup>2</sup> Sprint's offer to purchase these shares is subject to a number of conditions, including among other things the approval of a majority of Clearwire's stockholders not affiliated with Sprint.<sup>3</sup>

<sup>&</sup>lt;sup>2</sup> Applications of Sprint Nextel Corporation, Transferor, SoftBank Corp., and Starburst II, Inc., Transferees, for Consent to Transfer of Control of Licenses and Authorizations, IB Docket No. 12-343, Amendment at 7 (filed Dec. 20, 2012) ("Amendment").

<sup>&</sup>lt;sup>3</sup> Clearwire Corporation, Sprint to Acquire 100 Percent Ownership of Clearwire for \$2.97 per Share, News Release (Dec. 17, 2012).

This condition is not perfunctory at all, but rather introduces some significant unresolved contingencies for Sprint's offer. On January 8, 2013, Clearwire publicly disclosed that DISH made a competing offer to purchase all of the shares of Clearwire for \$3.30 a share. That offer represents a significant premium over Sprint's offer. Following DISH's offer, "[t]he Special Committee of the Clearwire Board of Directors . . . determined that its fiduciary duties require it to engage with DISH to discuss, negotiate and/or provide information in connection with the DISH proposal."

The existence of the DISH offer on the table increases the uncertainty over the Sprint offer's chances of success, and a number of minority shareholders have already voiced concern. One shareholder called Sprint's bid a "highly coercive proposal" and "an absolute outrage and, in our view, a clear breach of the board's fiduciary duties to the public stockholders." Indeed, certain minority shareholders have filed a court challenge alleging that Sprint is using Clearwire to further Sprint's unique interests to the detriment of Clearwire's minority stockholders.

These developments demonstrate that the proposed Sprint acquisition of the remaining shares of Clearwire is, at best, unsettled. For instance, Clearwire may be acquired by a party other than Sprint. Further developments could mean that Sprint's stake in Clearwire may not amount to the acquisition of *de facto* control over Clearwire that is contemplated by the

<sup>&</sup>lt;sup>4</sup> Press Release, Clearwire Corporation, Clearwire Corporation Provides Transaction Update (Jan. 8, 2013), *available at* http://corporate.clearwire.com/releasedetail.cfm?ReleaseID=732316 ("January 8 Clearwire Press Release"); *see also* DISH Network Corporation, DISH Statement Regarding Clearwire, Press Release (Jan. 8, 2013).

<sup>&</sup>lt;sup>5</sup> See January 8 Clearwire Press Release.

<sup>&</sup>lt;sup>6</sup> Thomas Gryta, Mount Kellett raises objections to Sprint's Clearwire bid, Total Telecom, *available at* http://www.totaltele.com/view.aspx?ID=478402.

<sup>&</sup>lt;sup>7</sup> Verified Second Amended Class Action Complaint, *Crest Financial Ltd. v. Sprint Nextel Corp.*, No. 8099-CS, at 24 (Del. Ch. Dec. 21, 2012).

Amendment to the Applications currently before the Commission.<sup>8</sup> SoftBank's control over Sprint may or may not involve the spectrum controlled by Clearwire. The transaction may not involve all of Clearwire's spectrum, because Clearwire may sell some of its spectrum to a new entrant rather than an incumbent like Sprint—a move that could both facilitate new entry and maintain Clearwire's independence. In fact, DISH's offer contemplates precisely such an outcome, in which DISH would acquire part of Clearwire's spectrum (thereby better positioning DISH as a new entrant), while allowing Clearwire to possibly remain independent and continue its operations, thereby increasing the level of competition in the sector. It is also possible that if Sprint is not in a position to deliver de jure and de facto control of Clearwire, the entire deal with SoftBank could be in jeopardy. These changes would affect the nature of, and the Commission's review of, the Applications and associated Amendment.

If, on the other hand, transfer of control of Clearwire to Sprint and SoftBank is part of the contemplated transaction, then significant spectrum aggregation issues will need to be thoroughly reviewed. The need to review the Sprint-Clearwire spectrum aggregation, and the lack of the data needed for this review, is one more reason for stopping the shot clock in the SoftBank-Sprint proceeding and allow the Applicant to assemble the required data. Consistent with the usual requirements for spectrum transactions of this size, the Applicants need to provide a comprehensive breakdown of all spectrum to be held by the Applicants on a market-by-market basis. This showing should include the amount of 2.5 GHz spectrum that the Applicants market to retail and wholesale customers as suitable for mobile broadband service in determining the

<sup>&</sup>lt;sup>8</sup> *See supra* note 2.

<sup>&</sup>lt;sup>9</sup> See Joan Lappin, Softbank's Brilliant Buy One (Sprint), Get One Free Deal (Clearwire), Forbes, Oct. 28, 2012, available at http://www.forbes.com/sites/joanlappin/2012/10/28/softbanks -brilliant-buy-one-sprint-get-one-free-deal-clearwire/ ("This whole deal is about Clearwire and its VAST spectrum position. That's the pot of gold and it comes with this deal almost for free, at least so far.").

appropriate screen for this proceeding. In addition, the Applicants should provide network usage data on a market-by-market basis so that the public and the Commission can evaluate the services that the Applicants currently provide and will provide if the transaction is approved. Finally, a showing of how the technology will migrate to support the additional spectrum should also be included. This is precisely the type of data that Sprint has demanded to see in previous transactions. Sprint was right to insist on other applicants supplying these data because the public and the Commission need it to properly review the transaction's effects on competition. Until this showing is provided, the shot clock should be suspended. Once it is provided in the appropriate form, the pleading cycle should be re-started so that the public can provide appropriate and relevant input.

The Commission has recognized that a proper evaluation requires an "orderly deliberative process." Orderliness would be thwarted if the Commission were to proceed now to review the Applications and Amendment if significant facts change, including among other things whether Sprint or another entity comes to control Clearwire. Then the process will have to begin anew, meaning that critical public time and resources will have been wasted.

In the judicial context, a claim is not ripe, and thus cannot proceed, if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." Although ripeness concerns addressed by federal courts in the context of Article III are not

<sup>&</sup>lt;sup>10</sup> See, e.g., Sprint Nextel Corporation, Petition to Deny, WT Docket No. 11-65, at 84 (May 31, 2011).

 $<sup>^{11}</sup>$  See LightSquared Subsidiary LLC, IB Docket No. 12-296, Order, DA 12-2051  $\P$  13 (rel. Dec. 20, 2012).

<sup>&</sup>lt;sup>12</sup> *Texas v. U.S.*, 523 U.S. 296, 300 (1998); *Thomas v. Union Carbide*, 473 U.S. 568, 580-81 (1985) (quoting 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532, at 112 (1984)).

binding on Commission agency decisions,<sup>13</sup> concepts of ripeness provide a "useful analogy" in determining whether the Commission should exercise its discretion to act where ripeness may be an issue.<sup>14</sup> Applying this analogy, the Commission has concluded that it will not decide unripe decisions unless unusual and compelling circumstances are present; circumstances that have not been shown to exist here.<sup>15</sup>

Consistent with the principles, the Commission has not hesitated to stop the clock on its consideration of a transaction in the presence of uncertainties or unanswered questions. In *Tribune*, for example, the Commission stopped the clock on the proposed license assignments, reasoning:

Confirmation of a plan of reorganization in the bankruptcy court has been significantly delayed and has not yet occurred, owing in large part to the Tribune Company's inability to reach consensus with its creditors . . . . Since the resolution of those issues will determine whether the current application remains viable, or will have to be either substantially amended or withdrawn, the FCC has been unable to complete its review.<sup>16</sup>

Similarly, in the AT&T-Qualcomm transaction, the Commission stopped the clock in light of the relationship between the transaction and AT&T's proposed acquisition of T-Mobile.<sup>17</sup> Here,

<sup>13</sup> Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1161 (D.C. Cir. 1995).

<sup>&</sup>lt;sup>14</sup> Omnipoint Communications, Inc., *Memorandum Opinion and* Order, 11 FCC Rcd. 10785, 10789 ¶ 9 (1996) ("*Omnipoint*").

<sup>&</sup>lt;sup>15</sup> *Id.* (refraining from reaching the question of which technology must be deployed to satisfy a milestone due to a lack of ripeness). *Cf.* Fox Television Stations, Inc., *Memorandum Opinion and Order*, 8 FCC Rcd. 5341, 5343-5344 (1993) (while the question of Fox's cross-ownership with a newspaper was not ripe, the Commission addressed it, reasoning that this was warranted by "unique and severe financial situation"), *aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995).

<sup>&</sup>lt;sup>16</sup> Letter from Barbara Kreisman, Federal Communications Commission, to John Feore, Dow Lohnes PLLC, MB Docket No. 10-104 (Oct. 12, 2011).

<sup>&</sup>lt;sup>17</sup> *See* Letter from Rick Kaplan, Federal Communications Commission, to Michael Goggin, AT&T Mobility Spectrum, LLC, and Dean Brenner, Qualcomm Incorporated, WT Docket No. 11-18 (Aug. 8, 2011). The Commission has also stopped the clock on transfer applications

while SoftBank's acquisition of Sprint, and Sprint's acquisition of Clearwire, are already part of the same proceeding, the relationship between the two transactions is still fluid in light of the uncertainties described above.

The question of how to treat merger applications in the face of unresolved contingencies has arisen in railroad mergers. These mergers are evaluated by the Surface Transportation Board or its predecessor Interstate Commerce Commission ("ICC"), an agency tasked with implementing the very statute on which the Communications Act was modeled. Faced with a subsequent third party offer, the ICC has suspended its consideration of the merger that was rendered uncertain by the offer. Thus, in the Burlington Northern-Santa Fe merger proceeding, consideration of Burlington Northern's acquisition of Santa Fe Railway was halted so that an offer made by another railroad for Santa Fe could be considered on equal footing and then restarted once Burlington Northern's offer prevailed. Similarly, in *Chicago and North Western*, Union Pacific sought to enter into several related contingent agreements that, if executed, would give it control of Chicago and North Western. Several parties argued that the applicants had submitted a "contingent" and "speculative" merger application that was beyond the ICC's authority because it was unclear if the change in control would ever come about. The ICC suspended the proceeding pending consideration of the issues and until the applicants changed their transaction to resolve these contingencies.<sup>19</sup>

wh

where the Commission seeks additional information from the applicant. *See* Letter from Ruth Milkman, Federal Communications Commission, to Karen Brinkman, Karen Brinkman PLLC, and John Nakahata, Wiltshire & Grannis, LLP, WT Docket No. 12-187 (Nov. 8, 2012); Comcast Corp., *Order*, 25 FCC Rcd. 3802 (2010); Verizon Communications, Inc., Public Notice, 20 FCC Rcd. 14727 (2005); SBC Communications, Inc., Public Notice, 20 FCC Rcd. 14579 (2005).

<sup>&</sup>lt;sup>18</sup> Union Pacific Corp., Request for Informal Opinion-Voting Trust Agreement, ICC Finance Docket No. 32619, *Decision*, at 3-4 (Jan. 5, 1995) ("*Burlington Northern-Santa Fe*").

<sup>&</sup>lt;sup>19</sup> See Union Pacific and Chicago and North Western Holdings Corp., ICC Finance Docket No. 32133, *Decision No.* 6, at 2 (rel. May 28, 1993) ("*Chicago and North Western*").

Review of one offer vying for acceptance in the face of a higher one would also disrupt the Commission's policy of neutrality in corporate valuation contests. Allowing the review to go forward may have the effect of validating Sprint's initial offer for Clearwire at \$2.97/share, and might very well be used by Sprint as a leveraging tool in its urging of Clearwire shareholders to accept an inferior bid. Strengthening Sprint's hand in that fashion would contravene the longstanding policy of "strict governmental neutrality" in the corporate valuation process.<sup>20</sup> As the Commission has put it:

It is not in the public interest for our administrative processes to be utilized, either by design or by unintended result, in a manner which favors either the incumbent or the challenger in disputes over corporate control. We believe that marketplace considerations, rather than the artificial dictates of governmental procedures, should influence the decisions of the shareholders in tender offers and proxy contests.<sup>21</sup>

## III. THE COMMISSION SHOULD FIRST RESOLVE THE EAGLE RIVER RECONSIDERATION PETITIONS

Pending before the Commission are two petitions for reconsideration (filed by DISH and Crest Financial, a minority shareholder in Clearwire) of the immediate approval granted Sprint to purchase Eagle River's stake in Clearwire. That approval allowed Sprint to consummate the Eagle River purchase and increase its equity stake in Clearwire to over 50 percent. Before the transaction, Sprint had no form of control over Clearwire. After, it had *de jure* control. Immediate approval of such a change is unjustifiable. This is accentuated by the extreme position that Clearwire has staked out in response to Crest Financials petition to deny: "Grant of the Applications did not give Sprint *de facto* control over Clearwire or the unilateral ability to approve the Clearwire Merger Agreement, and therefore did not amount to a substantial transfer

 $<sup>^{20}</sup>$  Tender Offers and Proxy Statements, MM Docket No. 85-218, *Policy Statement*, FCC 86-67  $\P$  6 (rel. Mar. 17, 1986).

<sup>&</sup>lt;sup>21</sup> *Id*.

of control of Clearwire to Sprint."<sup>22</sup> This is not true. A transfer of *de jure* control from a position of no control at all is substantial enough.<sup>23</sup> If it were not, Verizon could buy 51% of AT&T tomorrow, get to appoint the majority of directors on AT&T's board, assert that it had no *de facto* control because of a requirement that disinterested directors decide certain matters, and obtain pro forma Commission approval in one day.

Moreover, whether the Eagle River purchase gave Sprint *de facto* control (as Crest alleges) or not (as Clearwire does),<sup>24</sup> there is no doubt that it facilitates the acceptance of Sprint's offer to buy the rest of Clearwire. First things first: the Commission should evaluate the propriety of the cursory treatment received by the Eagle River purchase before it takes up the larger SoftBank-Sprint transaction.

### IV. CONCLUSION

While the harm to the public interest in moving forward is clear, there is no harm to the Applicants. The likely changes to the nature, or even existence, of the Sprint acquisition of Clearwire will likely force the Applicants to file a major amendment to their Applications, which will again reset the pleading cycle. And the review of the Applications should not go forward in any event before the spectrum aggregation and network usage data are provided. Consequently, DISH respectfully requests that the proceeding be held in abeyance and that the "shot clock" be paused until a new pleading cycle is established.

<sup>&</sup>lt;sup>22</sup> Opposition of Clearwire Corporation, IB Docket No. 12-343, at 3 (Jan. 14, 2013).

<sup>&</sup>lt;sup>23</sup> 47 C.F.R. § 1.948(b)(1).

<sup>&</sup>lt;sup>24</sup> DISH takes no position on this issue.

### Respectfully submitted,

/s/

Jeffrey H. Blum
Senior Vice President and
Deputy General Counsel
Alison A. Minea
Corporate Counsel
Hadass Kogan
Associate Corporate Counsel
DISH Network L.L.C.
1110 Vermont Avenue, NW, Suite 750
Washington, DC 20005
(202) 293-0981

Pantelis Michalopoulos
Christopher Bjornson
Andrew W. Guhr
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000
Counsel for DISH Network L.L.C.

January 16, 2013

#### CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2013 a copy of the foregoing Request to Hold the Proceeding in Abeyance was filed electronically with the Commission by using the ECFS system and that a copy of the foregoing was served upon the parties below via First Class and electronic mail:

Nadja Sodos-Wallace CLEARWIRE SPECTRUM HOLDINGS LLC 1250 Eye Street, NW, Suite 901 Washington, DC 20005 (202) 330-4011 nadja.sodoswallace@clearwire.com

Regina Keeney
LAWLER, METZGER, KEENEY & LOGAN, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006
(202) 777-7700
gkeeney@lawlermetzger.com
Counsel to Sprint Nextel Corporation

John R. Feore
Dow Lohnes PLLC
1200 New Hampshire Avenue, NW, Suite 800
Washington, DC 20036
(202) 776-2818
jfeore@dowlohnes.com
Counsel for Softbank Corp., Starburst I, Inc.,
and Starburst II, Inc.

Viet D. Dinh
BANCROFT PLLC
1919 M Street, NW, Suite 470
Washington, DC 20036
(202) 234-0090
vdinh@bancroftpllc.com
Counsel for Crest Financial Limited

Brandon Sazue CROW CREEK SIOUX TRIBE P.O. Box 50 Fort Thompson, South Dakota 57339 (605) 245-2221 UtilitiesAuthority@CrowCreekSiouxTribe.com

/s/ Andrew W. Guhr
Andrew W. Guhr